



May 3, 2019

Michael C. Keiser, P.E.
District Executive
Pennsylvania Department of Transportation
Engineering District 8-0
2140 Herr Street
Harrisburg PA 17103-1699

Vaughn N. Schlachter, P.E.
District Construction Engineer
Pennsylvania Department of Transportation
Engineering District 8-0
2140 Herr Street
Harrisburg PA 17103-1699

**RE: York County; SR 0083-040
Contract No. 62880
Assessment of CELD's & RULD's**

Dear District Executive Keiser and Engineer Schlachter:

Cherry Hill Construction is in receipt of Mr. Keiser's letter dated April 29, 2019, regarding the above matter. This is our response.

In your April 29 letter, you have stated that the District is acting to impose liquidated damages in the amounts mentioned, and that the liquidated damages have accrued and will continue to accrue, and will be withheld from estimate payments otherwise due Cherry Hill Construction. You have stated that this is all in accordance with the contract. Your rationale for acting at this time seems to be expressed in your letter with these words: "Given that those negotiations appear to have broken down . . ."

Your position is very troubling to us, and we view your position as the District's reversing course on us in the midst of good faith discussions. And, of course, you did this at the same time that Cherry Hill was following normal contract change procedures. Here are the facts.

Cherry Hill encountered delays and disruptions not of our making during the Project, and we have been very specific in identifying them and very specific in seeking contract time extensions arising



from those delays/disruptions. Several meetings have been held between the District and Cherry Hill officials to address contract extensions.

On September 14, 2018 Damon Petrillo and I met with you (Mike Keiser) and your team. We discussed a 520 day extension. The District had no problem with granting a 500+ day extension, but the question that called for further discussion was “compensability” and “what was the per day cost” for a compensable day’s delay.

On December 13, 2018, Damon and I again met with you (Mike Keiser) and your team. At that time, we discussed a 505 day extension. Again, the District had no problem with granting a 500+ day extension, and again the question that called for further discussion was “compensability” and the “per day cost.” At this meeting, the District talked about a substantial completion date in December of 2019, and a final completion date on or about April 15, 2020. The discussion of a final completion date of April 15, 2020 would show that the District acknowledged 500+ day time extension.

Finally, Cherry Hill had a meeting with you (Mike Keiser) on March 12, 2019. Jack Frost (Tutor Perini Corporation, President/Chief Operating Officer, and Chief Executive Officer of Civil Group) and Damon were present for Cherry Hill (I was not available). Mike said that the District could offer 200+ days, plus about \$3 million, and perhaps would go to 500+ days in order to resolve Cherry Hill’s claims in the range of \$6 million. This was understood by Cherry Hill to be the District’s recognition of Cherry Hill’s entitlement to dollar damages and compensation for the balance of the 300+ days.

But then, an odd thing happened, and it originated on your end. Following the discussion for compensable days, you commented that (1) liquidated damages would be due, and (2) contractual default was a potential remedy available to the District. The whole conversation turned sour. The fact that both parties were making meaningful strides on a contract time extension, and then PennDOT began talking about imposing liquidated damages on the Project, made no sense to any of us on the Cherry Hill side.

We can only interpret the District’s words and behavior in the above meetings, together with its April 29 letter in this way. Cherry Hill believes that the District has deliberately chosen to walk-back from its established position that the District was agreeable to giving Cherry Hill a 500+ day contract time extension.

One other frustrating fact was that, on the one hand, you (Mike Keiser) informed Damon by an April 29 email that the District would suggest “potential dates” for a claim review meeting under our Notice of Claim by week’s end, and on the other hand, on that same day of April 29, we received your letter assessing liquidated damages. These are mixed messages.



Cherry Hill sees no rationale for any of this, except for us to interpret your April 29 letter assessing LD's as a threat in advance of your proposed meeting on our Notice of Claim. Cherry Hill finds this threat of assessing liquidated damages -- immediately in advance of your proposed meeting -- to be an exercise in bad faith negotiating. Let me explain.

As you are well aware, Cherry Hill, as a contractor, has chosen to pursue its only contractual remedy to address a contract dispute. Accordingly, it gave to the District its "Notice of Claim," dated April 24, 2019. This is the contractual procedure which contractors are supposed to follow in order to address disputes. It is your contract that requires it.

Your sudden decision to impose LD's was intentionally announced and visited upon Cherry Hill at the juncture of two events: (1) Cherry Hill's pursuit of its April 24, 2019 Notice of Claim, and (2) the District's reversal of its granting of 500+ days for entirely proper contract time extensions.

The District's simultaneous actions are threatening by their very nature, and they are contrary to your obligation to operate in good faith and fair dealing.

We ask you to note that our Notice of Dispute has laid the groundwork for discussions/negotiations in good faith, just as we are continuing to perform work on the Project in good faith.

Both our prior discussions with the District, as well as our Notice of Claim, have been pursued as a serious effort to express Cherry Hill's concern that the District did not timely address the changed conditions (the encountering of a subterranean water source) which resulted in a design change from the original contract plans at Structure 5 (Abutment 1) and Structure 6 (Connecting Wall). The original plans called for a spread footer design at this specified location, and the design was changed by the District after the District directed Cherry Hill to undercut below planned footer elevation, after which Cherry Hill encountered a subterranean water source, and thereafter struggled to control the uncontrolled water flow from the source.

Further, the District did not timely address the need for a jack and bore operation for a specific 24" drainage pipe which was called for under the plans to cross I-83 at about Station 171 + 60 Rt. The untimeliness delayed Cherry Hill's operations for the completion of embankment for Sediment Basin K-1 from the S1A 1 D Mass Excavation.

Further, the District did not timely address the changed conditions that Cherry Hill encountered at Ramp K, namely, the six month delay in excavation work as a result of existing debris within the mass excavation. The debris called for unusual operations to sort and dispose of unsuitable materials properly, and warranted a time extension.



Any of these problems, analyzed singly or together, warrant a contract time extension, and not the assessment of LD's. This can only be pursued through a Notice of Claim at this stage, and Cherry Hill is not responsible for "breaking down" negotiations by sending its Notice. To the contrary, it is acting responsibly.

Cherry Hill believes that your assessment of liquidated damages of the variety recited in your letter (1) does not take into account Cherry Hill's proper expectation (and the District's agreement) that Cherry Hill is entitled to a time extension, and (2) bears no reasonable relationship to the damages that the District has sustained, and (3) appears to be imposed as a penalty.

Cherry Hill is willing to discuss the Cherry Hill claims and the District's concerns, but it will not accept a threat to its contract revenues where the causes of delay originate with the District.

Very truly yours,

Henry Cheung

cc: C. Grainger Bowman, Esq.